THE CITY OF SAN DIEGO

MANAGER'S REPORT

DATE ISSUED: June 17, 2004 REPORT NO. 04-135

ATTENTION: Natural Resources and Culture Committee
Agenda of June 23, 2004

SUBJECT: La Jolla Children's Pool Joint Use

REFERENCE: Council Action (R-2003-1013), dated April 1, 2003
Manager's Report No. 03-054, dated March 26, 2003
Manager's Report No. 98-88, dated April 29, 1998
Manager's Report No. 97-176, dated September 29, 1997

SUMMARY

Issue(s)

1. Shall the Natural Resource and Cultural Committee recommend to the City Council to accept the recommendation to dredge the Children's Pool in order to return the Children's Pool to seasonal joint use for humans and seals?
2. Shall the City Manager upon direction from the City Council:
   a. Apply for grants/donations to complete the dredging project
   b. Provide to the City Council an accounting of the TOT Coastal Infrastructure Fund for purposes of prioritizing this project and dedicating funds to manage and maintain the Children's Pool as recommended on an annual basis?

Manager's Recommendation(s) –

1. Recommend to the City Council to accept the dredging project at the Children's Pool whereby seasonal joint use for humans and seals may potentially be achieved.

2. There are no funds allocated or programmed for this purpose. Therefore, recommend that the City Council:
   a) Authorize the City Manager to apply for grants and/or donation opportunities to complete the dredging project.
   b) Authorize the City Manager to develop an accounting document of the Coastal Infrastructure Fund for purposes of prioritizing the funds to account for the proposed maintenance expenditures anticipated in an on-going basis to achieve seasonal joint use. Requirements are: a) $250,000 in FY2005 and $250,000 in FY2006 (if necessary) to dredge as recommended in the alternatives if the project does not receive grants and/or donations; and an additional $133,000 annually to manage and maintain the Children's Pool.

Fiscal Impact –

1. The estimated cost to dredge the Children's Pool ranges between $250,000 and $500,000. This cost includes construction documents, permits, environmental, administration, and construction.
2. The cost to provide testing per year is $3,000. This cost may potentially be borne by the County Environmental Health Department.
3. The cost to rework the soil on a yearly basis per the County Environmental Health Department's non-advisory status is $5,000 per year
4. The cost to provide dredging every three to five years, budgeted on a yearly basis is $50,000
5. The cost for a limited full time ranger position with associated non personnel expense to provide education interpretation of the area and manage the mixed use of the site is $75,000 per year.

In order to support the recommendation to maintain the conditions of the Children's Pool on a continual basis for seasonal joint use, a defined fund allotment is required. The Park and Recreation Department cannot absorb these costs in their current operating budget.

BACKGROUND:

The Children's Pool breakwater was built in 1931 to provide a sheltered swimming area for children. Disturbed by the news of the drowning death of two young children at that time, Ellen Browning Scripps donated the funds, and the City designed and constructed the breakwater. It was subsequently dedicated and granted to the City per California State Chapter 937 with the following relevant conditions:

”The State of California do enact as follows: (a) That said lands shall be devoted exclusively to public park, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incidental to, or convenient for the full enjoyment of, such purposes; (b) the absolute right to fish in the waters of the Pacific Ocean over said tidelands or submerged lands, with the rights of convenient access to said waters over said lands for said purpose is hereby reserved to the People of California.”

Since its creation, the Children’s Pool has remained a popular attraction along the shoreline. A variety of users have come to rely on it for ocean access and beach recreation. For example, the San Diego/La Jolla Underwater Park, located offshore of the Children’s Pool, offers excellent diving. Because the children’s pool was built to eliminate major wave action, it not only is ideal for children to recreate, but also provides a protected area where divers can safely enter and exit the water.

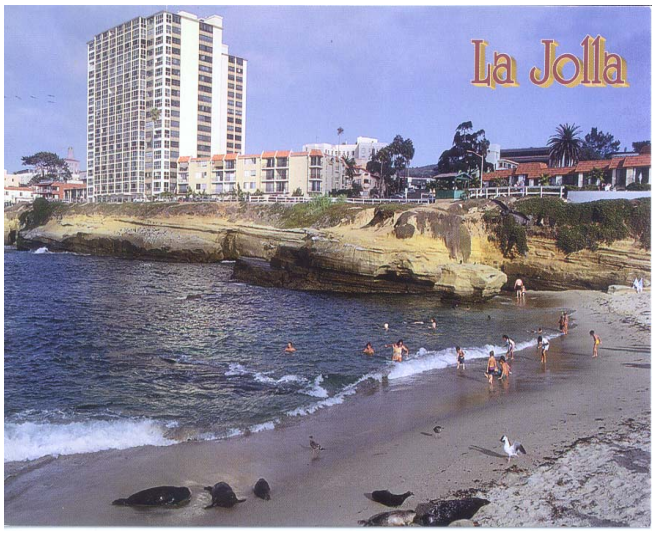
The breakwater originally featured four sluice gates designed to be opened when necessary to flush out sand that accumulated in the sheltered area behind the breakwater. Accretion of sand in the pool rapidly covered the sluice gates, and the sluices were subsequently filled with concrete and closed. Since 1931, the beach behind the breakwater has gradually widened as sand has accumulated in the sheltered pool. By 1998 the shoreline has advanced to its current state which leaves very little area for recreational swimming. The lack of a protected swimming area and proximity to an identified rip current near the breakwater opening has created significant safety concerns.

In addition to the safety concerns mentioned above, federal law prohibits the harassment of the large number of harbor seals that regularly “haul out” at the Children’s Pool. The term “haul out” refers to the method by which the seals crawl onto land for purposes such as resting, molting, giving birth and nursing. Although there are no City-imposed prohibitions on using the Children’s Pool, the federal Marine Mammal Protection Act (MMPA, adopted in 1972) generally makes it unlawful to harass seals. As a result,

recreational uses for children/bathers wishing to use the beach; fisherman wishing to fish; and divers wishing to use the entrance for deep water diving have been adversely effected.

Seal excrement has resulted in fecal coli form bacteria counts that significantly exceed State water quality standards for bathing beaches. The County Environmental Health Department therefore deemed the Children's Pool unsafe for human contact, and it was closed to the public for all water contact in September 1997. In 2003, the County Environmental Health Department notified the City that the designation for the Children's Pool had been changed to an advisory for the public to enter the water at their own risk based on changes in State policies, not because of changes in water quality counts. Lifeguard health and safety concerns also need to be addressed. While individual users may choose to ignore the advisory warnings and use the pool, in the event a lifeguard needs to perform a life rescue, they do not have this same discretion.

From the time the Children's Pool breakwater was built until the advisory by the County Environmental Health Department (1997) seals had been observed on the beach along



with people as illustrated. Most of the public recreated side by side with the small population of seals for many years. However, when the beach closure of Children's Pool by bathers occurred, the seal population began to increase, births occurred, and National Marine Fisheries Service (NMFS) began to treat the area as a colony. Now with seals present in their current capacity, there is a potential for seal harassment by observers in violation of the federal Marine Mammal Protection Act (MMPA) and the potential for injury to humans.

The health and safety of the water and sand quality is a serious matter. The State of California threshold for safe human contact with water is 200 bacteria organisms per 100 milliliters of water. In 1997, the test results were as high as 16,000 at Children's Pool. The County Environmental Health Department sponsors a web page showing their test results. Staff's tests on the sand at the surface taken in December 2003 were all over the

threshold except one (note this is not the higher season of seals hauling out). Past Manager's Reports as listed above have discussed those concerns in detail.

In order to accommodate all the interests at the Children's Pool, including the recreational use of seal watching enthusiasts as well as respecting the tradition of families that have swam in the pool and sun bathed on the beach, the City Council directed Park and Recreation Staff to return to Natural Resources and Culture Committee with a report on how, "in compliance with Federal Law, to reduce pollution levels in the sand and to return the Children's Pool to recreational use for children, including accessible uses, thus restoring this area to the joint use of seals, divers, fishermen, children and their families."

DISCUSSION:

On July 29, 2003, a Technical Advisory Committee (TAC) was formed by City Staff that was comprised of the following members:

- Joe Cordaro, Rick Hawkins, and Michelle Zetwo of the National Marine Fisheries Service (NMFS)
- Laurinda Owens, CA Coastal Commission
- Dale Sweetnam and Marilyn Fluharty of the County Environmental Health Department
- Dr. Pam Yochem and Dr. Brent Stewart of Hubbs-Sea World Research Institute
- Clifton Williams of Council District 1
- Michael Behan, John Hudkins and Robin Stribley of Park and Recreation, City of San Diego
- John Greenhalgh of Lifeguard services, City of San Diego
- Tracey Elliot-Yawn and Eliana Barreiros, Development Services Department of the City of San Diego

The purpose of the TAC was to brainstorm ideas by which to develop a healthy Children's Pool area, thereby lifting the advisory notice by the County Environmental Health Department, and returning the area back to a joint use of seals, divers, fishermen, children and their families. The TAC considered eight various ideas of which the top three were:

1. Dredge the beach in conjunction with floating platforms
2. Close the Children's Pool to public use and leave it for the seals
3. Create a new Children's Pool

An evaluation by the Park and Recreation Department of each of these three concepts is below. In order to perform this analysis, interviews and discussions have been ongoing with the National Marine Fisheries Service, Dr. Yochem of Hubbs-Sea World Research Institute, Dr. Doyle Hanan of Hanan and Associates, Dr. Hani Elwany of Coastal Environments, Development Services Department Environmental Assessment Section staff, Coastal Commission Staff, Army Corp representatives and several oceanographic and biological professionals. Staff also performed field tests to confirm past data

collected by the County Environmental Health Department and others respective to water and sand contamination.

#1 Dredge the beach in conjunction with floating platforms

In order for any joint use to occur, the sand beach and water quality needs to be improved. Therefore, the concept here is to dredge the beach and reduce the beach space so that less seals haul out in this location potentially limiting the contamination amounts to below "Non-Advisory" levels. The process would include removing 3,000 cubic yards of clean sand in the back part of the beach and re-working the contaminated sand located closer to the waters edge backwards toward the tower. The pool area would be contoured to a profile similar to when the break water was built thus allowing the pool area to be restored and much further in from the rip tide(s). Tests would than be done and the sand manipulated until the sand and water conditions meet the established health standards.

The floating platforms that were suggested were not a requirement, but rather were seen as a "good will" gesture that may provide the seals an alternative place to haul-out. There is still speculation as to whether the seals would use a floating platform, especially in the area by Children's Pool since the tidal action is extreme. The need for platforms and their ability to accomplish the goal would need to be further researched (a case study may exist in Seattle/staff will investigate). Potentially a state or federal grant could be applied for as a research experiment to solve the costliness of this piece of the recommendation.

This alternative has been proposed in the past and Mitigated Negative Declaration LDR No. 98-0671, dated March 1999, was ready for certification had the City Council voted for the proposal. Appropriate biology, tidal action, sand resource issues, as well as many other concerns were addressed at that time. The public review period had been completed. If this alternative were chosen, the Development Services Department management has stated that the MND can be amended and re-circulated. The only change from the earlier MND that this alternative would consider, is the placing of sand on the beach next door and in the small pool area adjacent to the breakwater. The operation would be done in such a way that the tidal action would carry the sand out to sea. The original MND had the sand disposal at Marine Street and/or La Jolla Shores Beaches respectively.

#2 Close the Children's Pool to public use and leave it for the seals

Many in the TAC struggled with joint use being do-able and preferred letting the seals remain at Children's Pool. There is also a contingent of persons who feel that the seals provide a tourist attraction for visitors in the area. There are varying opinions as to the economic benefit the seals provide.

The seal population hauling out prior to the beach closure was less than a dozen seals at Children's pool (Dr. Brent Stewart testimony at aforementioned hearing). Studies from Drs. Pam Yochem/Brent Stewart of Hubbs-Sea World, dated January 2, 1998, and that of

Dr. Hanan of Hanan & Associates, dated May 1, 2004, shows the current population at Children's Pool to be in the general neighborhood of 160 to 200 seals. State and federal regulators are currently confirming that the seal populations are at optimum sustainable populations (OSP). Many believe if they are not, they are very close and that the rate of increase is such that this goal will be met. Seals are not an endangered, threatened or a depleted species (Marine Mammal Stock Assessments: 2003/draft). The Park and Recreation Department struggles with leaving the Children's Pool exclusively to the seals for several reasons. Concerns by the Park and Recreation Department are that as the seal population grows further; will more beaches become a seal haul out? Staff asked Dr. Hanan if there was a possibility for the growth rate of seals in San Diego to grow beyond Children's Pool boundaries and if it was possible for them to overspill into other City beaches. He stated that possibility was indeed real. An Oversight Field Hearing by the Committee on Resources/US House of Representatives/108th Congress/First Session was held in San Diego on August 19, 2003, to discuss the "MARINE MAMMAL PROECTECTION ACT OF 1972: THE ESCALATION OF INTERACTIONS BETWEEN THE GROWING POPULATIONS OF MARINE MAMMALS AND HUMAN ACTIVITIES ON THE WEST COAST." A report with this title providing the minutes is available as Serial No.108-50. Mr. Lecky, an official with NMFS, stated at the hearing that they "could probably use some additional policy guidance in terms of deciding whether or not we are going to sacrifice beaches to marine mammals…"

The Park and Recreation Department had further concerns about other disturbing testimony at the aforementioned hearing. Many testified that the fact that marine mammals are no longer as intimidated by humans as before and it has cost municipalities and commercial industries substantial funds to manage. Many spoke of having to abandon docks because they are haul outs; sinking private boats because mammals now haul out on them; trying to keep from being bitten when people try to get to their boats, etc. State and Federal Agencies testified that there is nothing within current guidelines of the MMPA to address effective deterrent methods. No deterrents as tested by various groups have been found to keep unwanted animals from hauling out where they want to and many have been tested, such as: firecrackers, cracker shells, acoustic harassment devices, acoustic deterrent devices, pulse powered discharge systems, predator sounds, vessel chase, tactile harassment, taste aversion, physical barriers, predator models, capture and relocate, and capture and placement in captivity.

NMFS has mentioned that if seals decide to pick another beach, provided the new area does not become a birthing place, seals can be harassed enough to be shooed from the beaches. However, the testimony available in the aforementioned minutes showed this does not always work and must be done consistently, and then, as reported above, they typically return when the resource staff leaves in most cases. The management of this potential problem could be a huge monetary commitment with limited success. The City departments do not have the resources to deal with this type of mammal management should this escalate.

Various Agency Discussions: NMFS officials will likely allow a restoration of the beach for humans if it is done with their guidance under the MMPA. "I think we could support

decision to go either way given the tools that are in the statute. The animals clearly are causing water quality problems, public health problems," Lecky testimony dated August 19, 2003. They stated they will work with the City under an incidental harassment permit for the dredging project and allow deterrents if the local decision makers resolve this "local" issue with a consistent decision. In addition, NMFS would support the beach exclusively for the seals too (Lecky testimony dated August 19, 2003). They would like the City to choose one or the other; they are not in favor of joint use. The California Coastal Commission staff will support the dredging in order to clean the sand and water for public safety and heath. The Department of Fish and Wildlife, the State Fish and Game, the Army Corp of Engineers will be consulted throughout the process in re-circulation of the MND and staff has discussed this project with them recently.

#3 Create a new Children's Pool

The TAC also recommended building a new Children's Pool elsewhere. This idea would be extremely expensive. In addition, the original Children's Pool is historic in nature and has sentimental value that is not replaceable by building a new one.

RECOMMENDATION

Joint use can be considered in two ways. The first being joint use seasonally and the second being joint use year round (as done before 1997). The following alternative looks to create joint use on a seasonal basis. It also looks to create a "non-advisory", clean beach during human contact times. It is not by any means a "given" this approach will work. Seals are a wild animal and their reaction to this concept is not fully predictable. However, it would be a first step in trying various safe affordable options. The procedure would be as follows:

A. Complete and certify the MND
B. Apply for: Army Corp permit, California Coastal Commission Coastal Development Permit, and NMFS Incidental Harassment Permit
C. Develop contract and dredge the beach
D. Test the beach/sand and water for pollution
E. When the tests show acceptable levels for humans:
    a. human use from July 1 to January 1
    b. seal use for rookery and haul-out during Jan 2 to June 30
F. In order to secure the area for humans from July 1 to January 1, staff will look to provide a deterrent in coordination with NMFS that prohibits the seals from beaching during the human use time (if necessary)

The idea behind the seasonal alternative is to provide joint use and recreation for all users, bathers and seal watchers. Prior to reuse by humans, the sand will be tested and likely need to be "worked" on a yearly basis just prior to July. The potential concern here is that the seals would receive mixed signals and inconsistency is difficult for them to understand. They are known to be quite adaptable to situations however, so this option may seek to find a compromise between all concerned at Children's Pool.

In order to achieve the joint use year round, it is likely that similar steps A through D as above would be taken. The difference in year round joint use would be E through F.

A. Complete and certify the MND
B. Apply for: Army Corp permit, California Coastal Commission Coastal Development Permit, and NMFS Incidental Harassment Permit
C. Develop contract and dredge the beach
D. Test the beach/sand and water for pollution
E. When test results show acceptable levels for humans, deter the seals from using the beach by providing physical barriers in coordination with NMFS
F. When such time as the seals learn to go elsewhere, potentially seal rock and even the Channel Islands, remove the deterrent and if a few straggler seals appear as before, provided they are small in numbers, P&R/Ranger will manage the interaction.

The idea here is that the beach is basically restored for human use and the old style of shared use may actually re-occur. In this scenario, the seals will be given clear signals that they are not welcome for an extended amount of time and find a whole new haul out location. Then the few who are persistent or maybe even the few seals released from Sea World rescue missions in this location will come back since they have a long history at Children's Pool.

It is hereby recommended to dredge the Children's Pool to its 1940s configuration and to offer seasonal use of the pool for humans and seals.

ALTERNATIVE(S):

Modify the recommendation to dredge the Children's Pool to its 1940s configuration and to offer year round use of the pool for humans and the potential for joint use with seals.

Modify the recommendation to not dredge the site.

Respectfully submitted,

Ellen Oppenheim
Park and Recreation Department Director

Approved,

George I. Loveland
Assistant City Manager

EO:AP:ap